INDEX

	Page
Opinions	2
Jurisdiction	2
Questions Presented	2
Statute Involved (see Appendix to Brief)	3
Statement of the Facts	3
Specifications of the Errors to be Urged	4
Reasons for Granting the Writ	5
Brief	7
The Facts	7
The federal question	7
The Illinois (local) question	9
Appendix	11

TABLE OF CASES CITED

Cash v. N. Y. C. R. Co., 294 Ill. App. 389	9
Chapman v. Baltimore & Ohio Railroad Co., 340 Ill. App. 475 (1950)	9
Coleman v. C. B. & Q., etc., 287 Ill. App. 483	9
Fox v. I. C. R. Co., 308 Ill. App. 367	9
Langston v. Chicago & Northwestern Railway Co., 330 Ill. App. 260 (1947), aff. 398 Ill. 248 (1947)	9
Lavender v. Kurn, et al., 327 U. S. 645, 652, 653, 90 L. ed. 916, 922, 923 (1946)	8
Miles v. American Steel Foundries, 302 Ill. App. 262, 267 (1939)	9
Miller v. Union Pacific Railroad Company, 290 U. S. 227, 78 L. ed. 285 (1933)	8
Tennant v. Peoria & Pekin Union Railway Company, 321 U. S. 29, 35, 88 L. ed. 520, 525 (1944)	7

IN THE

Supreme Court of the United States

October Term, 1950

No.

EDWARD O'KEEFE and RALPH VAIL, *Petitioners,*

v.

WABASH RAILROAD COMPANY, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, appellees below, and plaintiffs in the Trial Court (hereafter called plaintiffs), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on December 28, 1950, denying Petition for Rehearing of an opinion issued November 29, 1950, 185 F. (2d) (Adv. Ops.) 241. (R. 330)

OPINIONS BELOW

The United States District Court for the Eastern Division of the Northern District of Illinois entered a memorandum opinion on motion of respondent, appellant below, defendant in the Trial Court (hereafter called defendant), denying defendant's motion to set aside the verdict of a jury and to enter judgment for the defendant, and also denying defendant's motion for a new trial, which memorandum is not reported but appears on pages 291, 292 of the record. The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 185 F. (2d) (Adv. Ops.) 241 and following. (R. 311)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 28, 1950. (R. 330) The jurisdiction of the Court is invoked under Title 28 U. S. C. A. 1254(1) and 2101(c).

QUESTIONS PRESENTED

The case involves two questions:

First:

> Whether the Court of Appeals for the Seventh Circuit was free to reweigh the evidence and set aside the jury verdict in favor of plaintiffs, merely because the jury could have drawn different inferences or conclusions from the evidence, or because the Court of Appeals felt that a verdict for the defendant was more reasonable?

Second:

> Whether the jury verdict for the plaintiffs had sufficient support in the evidence to render entry of a judgment for defendant notwithstanding the verdict, an unconstitutional deprivation of plaintiffs' right to a jury trial under the Seventh Amendment to the Constitution of the United States?

STATUTE INVOLVED

The pertinent statute discussed in the argument is set out in the appendix to the brief.

STATEMENT OF THE FACTS

Plaintiffs were passengers in an automobile driven by Leo Vezina. In the darkness of the early morning of September 7, 1947, when the fog was so dense that Vezina could not see more than fifteen or eighteen feet from his position at the wheel of the car (R. 45) defendant caused a train to be standing across a roadway on which Vezina, with plaintiffs as his guests, was driving.

There was a flasher signal marking "STOP" which Vezina testified (R. 35) was not working. The signal was located about fifteen-and-one-half feet on Vezina's side of the tracks and about seventeen-and-one-half feet to Vezina's right.

Plaintiff O'Keefe (R. 56) also stated no lights on the flasher signal were working.

One of defendant's witnesses, Hunsicker (R. 228), on cross-examination testified that the flasher signal was not working at the time of the accident.

The headlight from the locomotive was turned off (R. 148) so as not to blind the eyes of defendant's employees (R. 187).

An Illinois State officer who arrived at the scene soon after the accident testified that the flasher signal was not working (R. 123).

The engineer and brakemen of defendant's train were thoroughly familiar with the crossing (R. 143, 144, 193, 194), a low area which floods after rains (R. 117), is fog-bound once or twice a week during spring and fall, or whenever a warm day is followed by a cool night (R. 124).

Defendant's witnesses testified that there were lights at the crossing and on the train, and that the flasher signal was working.

Thus, under the circumstances, mixed questions of law and fact arose: whether the proximate cause of the accident was the negligence of the defendant railroad, or the negligence of the driver of the automobile, or the concurring negligence of both of them? The claim of negligence on the part of the defendant railroad is predicated on blocking the highway without a headlight on its locomotive, with its flasher signal not working, when fog was so dense that the railroad train could not be seen from more than fifteen feet away.

Another mixed question of law and fact arose: whether the plaintiffs, as passengers, had been guilty of contributory negligence under all of the circumstances?

The Trial Court submitted these questions to the jury which returned a verdict of Thirty Thousand Dollars ($30,000) for Vail and Eight Thousand Dollars ($8,000) for O'Keefe.

During the trial, the Trial Court overruled defendant's motion for a directed verdict at the close of plaintiffs' case (R. 109), reserved defendant's motion for a directed verdict at the close of all of the evidence (R. 249), and after the verdict and judgment had been entered, overruled defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial. (R. 291)

The Court of Appeals for the Seventh Circuit reversed, without remanding for a new trial, directing the entry of judgment for the defendant. (R. 319)

SPECIFICATIONS OF THE ERRORS TO BE URGED

It is urged that the United States Court of Appeals for the Seventh Circuit erred:

1. In reweighing the evidence and setting aside the jury verdict merely because the Court of Appeals was of the opinion that a verdict for defendant was more reasonable.

2. In depriving plaintiffs of a right to jury trial, contrary to the Seventh Amendment to the Constitution of the

United States, by holding that the verdict of the jury was not based on evidence from which an inference of negligence could lawfully be drawn.

3. In finding no facts in the record to take the case out of the ordinary rule that one cannot recover for driving his automobile into a train standing on a crossing, for the reasons:

(a) *Plaintiffs* were not driving but *were guests.*

(b) *Defendant violated a statute* requiring it to use a headlight on its locomotive, which was *prima facie* evidence of negligence.

(c) Special circumstances show that *the train was* to all intents and purposes *invisible* to one in the exercise of ordinary care.

4. In holding that the evidence fails to show, notwithstanding the verdict of the jury, that any negligence of the defendant could be the proximate cause of the accident.

REASONS FOR GRANTING THE WRIT

Plaintiff assert that a writ of certiorari should be granted in this cause under sub-division 5(b) of Rule 38 of this Court for the reason that the United States Court of Appeals for the Seventh Circuit has decided:

(i) a federal question in a way probably in conflict with applicable decisions of this Court;

(ii) an important question of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, petitioners pray that a writ of certiorari may issue out of this Court directed to the United States Court of Appeals for the Seventh Circuit, and upon review its judgment be vacated and reversed, and that this case

be remanded to said Court with appropriate instructions to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

MILTON W. KING,
BERNARD I. NORDLINGER,
ELLIS B. MILLER,
419 Southern Building,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1950

No.

EDWARD O'KEEFE and RALPH VAIL, *Petitioners,*

v.

WABASH RAILROAD COMPANY, a corporation, *Respondent.*

BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI

THE FACTS

As has been shown in the foregoing Petition, plaintiffs were guests in an automobile. Defendant's train was to all intents and purposes, invisible at the crossing, due to dense fog. Defendant's flasher signal was not working. Defendant's locomotive was not using its headlight, in violation of *par. 187, Ch. 144, Ill. Rev. Stat. 1949* (Jones Ill. Stats. Ann. 114.154).[1]

THE FEDERAL QUESTION

In *Tennant* v. *Peoria & Pekin Union Railway Company,* 321 U. S. 29, 35, 88 L. ed. 520, 525 (1944) this Court held:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

[1] Set out in Appendix.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion."

Again, in *Lavender* v. *Kurn, et al.*, 327 U. S. 645, 652, 653, 90 L. ed. 916, 922, 923 (1946), this Court stated:

"The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

* * * * * * *

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also, *Miller* v. *Union Pacific Railroad Company*, 290 U. S. 227, 78 L. ed. 285 (1933).

Litigants in federal courts may be effectually deprived of the benefits of jury verdicts if the decision of the Circuit Court of Appeals in the case at bar is not reversed.

THE ILLINOIS (LOCAL) QUESTION

Defendant's failure to use its locomotive headlight, in violation of statute,[2] was *prima facie* negligence. In Illinois, as elsewhere, "The violation of a statute is *prima facie* evidence of negligence." *Chapman* v. *Baltimore & Ohio Railroad Co.*, 340 Ill. App. 475 (1950).

The case at bar is governed by *Langston* v. *Chicago & Northwestern Railway Co.*, 330 Ill. App. 260 (1947) and the affirmance thereof at 398 Ill. 248 (1947).

Furthermore, the rule of the cases relied on by defendant and cited by the Circuit Court of Appeals[3] is inapplicable in this:

Although ordinarily the presence of a train at a crossing is adequate warning, special circumstances such as dense fog,[4] or failure of lights or flasher signals,[5] make "proximate cause" to become a question of fact, rather than one of law.

The trial judge was of the opinion in the case at bar (R. 291) that the presence of the train at the crossing could not be readily ascertained, and this opinion must perforce be viewed against a background of evidence showing defendant's violation of the Illinois locomotive headlight statute and failure of its flasher signal to operate.

---

[2] Set out in Appendix.

[3] *Coleman* v. *C. B. & Q., etc.*, 287 Ill. App. 483; *Cash* v. *N. Y. C. R. Co.*, 294 Ill. App. 389; *Fox* v. [illegible]. *C. R. Co.*, 308 Ill. App. 367.

[4] *Compare, Miles* v. *American Steel Foundries*, 302 Ill. App. 262, 267 (1939) where the Court said: "There was no fog or mist or anything of the kind to deter the plaintiff from seeing if he had looked."

[5] *Langston* v. *Chi. & N. Ry. Co., supra; Chapman* v. *B. & O. R. Co., supra.*

Accordingly, proximate cause becomes a question of fact under Illinois law, a determination of which, in the federal system, is crystallized in a jury verdict, inviolable under the Seventh Amendment to the Constitution of the United States.

Respectfully submitted,

MILTON W. KING,
BERNARD I. NORDLINGER,
ELLIS B. MILLER,
419 Southern Building,
Washington 5, D. C.,
Attorneys for Petitioners.

APPENDIX

"HEADLIGHTS ON LOCOMOTIVE ENGINES—EXCEPTION—SPECIFICATIONS. SEC 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all common carriers by railroad, operating or doing business in this state, shall be required to equip and maintain and use on all locomotive engines used by them in passenger service (except suburban passenger service) a headlight of sufficient candlepower, measured with the aid of a reflector, to throw a light in clear weather that will enable the operator of the same to plainly discern an object the size of a man, upon the track, at a distance of 800 feet from the headlight; and upon all locomotive engines used by them in freight service, exclusive of engines in switching, and transfer service, with a headlight of sufficient candlepower, measured with the aid of a reflector to throw a light in clear weather that will enable the operator, of same, to plainly discern an object the size of a man upon the track, at a distance of 450 feet from the headlight; and upon all engines used by them in switching, transfer, and suburban passenger service, with a headlight of sufficient candlepower, measured with the aid of a reflector, to throw a light, in clear weather, that will enable the operator to plainly discern an object the size of a man upon the track, at a distance of 250 feet from the headlight: Provided, this act shall not apply to any locomotive engines running between sunup and sundown, or any locomotive engine, the equipment of which has failed during the trip, providing it is shown that the equipment was in efficient and effective working condition when the trip was begun.

PENALTY FOR VIOLATION. SEC. 2. That any common carrier by railroad violating any of the provisions of this act, shall be guilty of a misdemeanor and shall be subject to a fine of not less than one hundred dollars ($100.00), nor more than five hundred dollars ($500.00) for each offense."

FILED
APR 18 1951
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 624

EDWARD O'KEEFE AND RALPH VAIL,
Petitioners,

vs.

WABASH RAILROAD COMPANY, A CORPORATION,
Respondent.

BRIEF OF WABASH RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ELMER W. FREYTAG,
KENNETH B. HAWKINS,
11 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Respondent.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Statement of the Case 1

Argument 2

I. The Court of Appeals did not decide a federal question in a way in conflict with the applicable decisions of this Court 2

II. The Court of Appeals did not decide an important question of Illinois law in a way in conflict with applicable Illinois decisions 4

Conclusion 10

Table of Cases.

Cash v. New York Cent. R. Co., 294 Ill. App. 389 7

Coleman v. Chicago, B. & Q. R. Co., 287 Ill. App. 483 ... 6

Curran v. C. & W. I. R. R. Co., 289 Ill. 111 4

Fox v. Illinois Cent. R. Co., 308 Ill. App. 367 7

Galloway v. United States, 319 U. S. 372; 87 L. ed. 1458 3

Langston v. C. & N. W. Ry. Co., 398 Ill. 248 ..... 4, 6, 8

Lavender v. Kurn, 327 U. S. 645; 90 L. ed. 916 2

Overstreet v. Illinois P. and L. Corp., 356 Ill. 378 6

Probert v. Chicago, I. & L. Ry. Co., 93 F. (2d) 259 7

Reines v. Chicago, M. & St. P. & P. R. Co., 194 Wash. 146; 80 Pac. (2d) 406 7

Tennant v. Peoria & Pekin Union R. Company, 321 U. S. 29; 88 L. ed. 520 2

Statute.

Ill. Rev. Stat. State Bar Ass'n Ed. 1949, Chap. 114, Sec. 187 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 624.

EDWARD O'KEEFE AND RALPH VAIL,
Petitioners,

vs.

WABASH RAILROAD COMPANY, A CORPORATION,
Respondent.

BRIEF OF WABASH RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioners' statement of facts is incomplete and inaccurate. A more complete and accurate statement appears in the decision of the Court of Appeals at pages 311 to 314 of the record (185 F. (2d) 241 at 242-244). The physical surroundings may be readily visualized from an examination of the prints of the photographs introduced in evidence as Petitioners' Ex. No. 1, and Respondent's Exs. Nos. 2, 3, and 4 (R. 261, 263, 264, 265). The caboose, with which the petitioners' automobile collided, is shown in Respondent's Exs. Nos. 6, 7, 8, and 11 (R. 267, 268, 269 and 272).

ARGUMENT.

I.

The Court of Appeals Did Not Decide a Federal Question in a Way in Conflict With the Applicable Decisions of This Court.

The first reason advanced by petitioners for granting the writ of certiorari is that the Court of Appeals has decided "a federal question in a way probably in conflict with the applicable decisions of this Court."

In support thereof, petitioners cite *Tennant* v. *Peoria & Pekin Union R. Company,* 321 U. S. 29, 88 L. ed. 520, a Federal Employers' Liability Act case in which certiorari was granted "because of important problems as to petitioner's right to a jury determination of the issue of causation." The lower court had found that the respondent was negligent; but, *after weighing the conflicting evidence,* also found that this negligence was not the proximate cause.

Lavender v. *Kurn,* 327 U. S. 645, 90 L. ed. 916, cited by petitioners, was another Federal Employers' Liability Act case in which the Supreme Court of Missouri *weighed the evidence on the conflicting theories* as to whether the switchman had been murdered by a third party or struck on the head by a hook protruding from the respondent's passing mail car. The facts were such that he could have been so struck; and, accordingly, this Court held that the Supreme Court of Missouri erroneously reversed the judgment.

The reasons for granting the writ of certiorari in the foregoing cases are completely lacking in the case at bar in which the Court of Appeals recognized that it had no

right to weigh conflicting evidence. Because there might be doubt as to the Petitioners' contributory negligence the Court specifically refrained from reversing the judgment on this ground.

The Court then determined, as a matter of law, that there was no evidence of any negligence on the part of the respondent; and, therefore, reversed the judgment solely on that ground. This is clearly shown by the decision of the Court commencing at the bottom of page 314 of the record (185 F. (2d) 241, at 244):

> "• • • It would seem that under these circumstances the evidence established contributory negligence, but since we are in doubt as to whether there was a jury question in this respect, we prefer to discuss defendant's second contention, *i. e.*, that no actionable negligence was shown. We must determine whether there was any evidence upon which a charge of negligence on defendant's part can be found in the record."

And, in the concluding paragraph of its decision, at page 318 of the record, says:

> "Since the evidence fails to show any negligence of defendant which proximately contributed to the accident, the judgment must be reversed. It is so ordered."

Petitioners' contention, that the reversal of this judgment by the Court of Appeals on the ground that the evidence failed to show any negligence on the part of respondent which proximately contributed to the accident violated the Seventh Amendment to the Constitution of the United States, is frequently made, primarily for the purpose of having this Court again review the facts, notwithstanding there may be no special or important reason for granting the writ. This contention has been repeatedly held to be without merit. As stated in *Galloway* v. *United States*, 319 U. S. 372, 87 L. ed. 1458, at page 389:

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. (Citing cases.)"

II.

The Court of Appeals Did Not Decide an Important Question of Illinois Law in a Way in Conflict With Applicable Illinois Decisions.

The second reason advanced for granting the writ is that the Court of Appeals decided "an important question of local law in a way probably in conflict with applicable local decisions." This second reason is subdivided into two contentions that (1) the violation of a statute is *prima facie* evidence of negligence and (2) the facts in the case at bar do not fall within the general rule that a train standing on a crossing is in itself sufficient notice and warning, but fall within the exception to the general rule as announced in the case of *Langston* v. *C. & N. W. Ry. Co.*, 398 Ill. 248.

(1) Petitioners' statement, "The violation of a statute is *prima facie* evidence of negligence.", is a correct statement as far as it goes, but it does not go far enough because the mere violation of a statute imposes no liability unless such violation is a proximate cause of the injury. (*Curran* v. *C. & W. I. R. R. Co.*, 289 Ill. 111.)

Nowhere in petitioners' amended complaint, under which this case was tried, nor in their second amended complaint filed seventeen days after judgment and seven days after the filing of respondent's motion to set aside the judgment, did petitioners specifically charge a violation of the

statute relating to the equipment of locomotive engines with headlights (Section 187, Chapter 114, Illinois Revised Statutes, 1949). A violation of this statute was urged for the first time in the Court of Appeals in an attempt to support the general charges of negligence contained in the second amended complaint.

There was no violation of this statute. In switching freight cars, the front headlight is turned off when the engine is backing so as not to interfere with or blind a switchman up ahead (R. 187). That was done in the case at bar; and, in lieu thereof, the headlight on the tender was turned on. The purpose of a headlight is to illuminate the roadbed in the direction the train is running. When a train is backing, a lighted headlight on the front of the engine is not required, but there must be a lighted headlight on the rear shining in the direction in which the train is proceeding. There is no dispute over the fact that respondent had a lighted headlight on the rear of the engine tender (R. 132). As the train had just completed its backing movement and had not yet started forward, that was the proper place for it. Only when the train started forward again would there be a duty to have the front headlight lighted.

The Court of Appeals did not overlook this asserted violation, but considered it carefully and found that the record did not support petitioners' contention. (R. 316, 317; 185 F. (2d) 241, at 245)

Both in their petition and in their brief, petitioners state that the train was to all intents and purposes invisible as it stood at the crossing. This statement is directly contrary to the undisputed facts. As pointed out by the Court of Appeals in its decision (R. 313, 185 F. (2d) 241, at 243):

> "The evidence was undisputed that the caboose was lighted with several oil lamps or lanterns—it carried

> a 'marker light' on each side 5 or 6 feet above the rear platform, both lighted, and one of these was directly over the steps into which the automobile crashed; there was a lighted 'Aladdin' lamp on the desk which stood directly under an open window about 15 feet from the rear of the caboose, and another lamp across from it; the rear door of the caboose was open. All the usual lights in the cab of the engine were burning, but the headlight was turned off, as the engineer explained, so he could see the signals and because he did not think it was necessary while he was backing up. He did, however, have the backing light on the coal tender turned on, and this served as a headlight during the backing operations."

The Court, therefore, correctly applied the Illinois law (See *Overstreet* v. *Ill. P. and L. Corp.*, 356 Ill. 378, at page 385).

(2) Petitioners' second argument for granting the writ on the ground that the Court of Appeals decided an important question of local law in conflict with applicable local decisions is based on *Langston* v. *C. & N. W. Ry. Co.*, 398 Ill. 248.

Their argument indicates a confused interpretation of the case at bar. The decision of the Court of Appeals does not overrule or conflict with the *Langston* decision; nor does the *Langston* decision overrule or conflict with the decision in *Coleman* v. *Chicago, B. & Q. R. Co.*, 287 Ill. App. 483, upon which the Court of Appeals relied.

The *Coleman* case lays down the general rule obtaining in Illinois. At page 489, the Court says:

> "It is thus apparent that the decided weight of authority establishes the proposition that where a railroad train rightfully and for a reasonable period of time occupies a crossing of its tracks with a public highway, the very presence of the train is adequate notice and warning to any traveler, who is in the exercise of ordinary care for his own safety, that the

crossing is occupied; that no additional signs, signals or warnings are required to be given by the railroad company, *and that no negligence can be imputed to it for its failure so to do.* * * *

"From the authorities cited, and upon this record, it is manifest that the defendant did not owe to the plaintiff the duty, charged in the declaration, of giving notice of the fact that its train was blocking the crossing at the time in question, *and hence the failure to give such notice was not the proximate cause of the collision and consequent injury to the plaintiff.*

"When there is no proof which tends to establish the fact that defendant was guilty of some act or omission which was the proximate cause of plaintiff's injury, the latter fails to make a case." (Italics supplied.)

This decision was followed and approved in *Cash* v. *New York Cent. R. Co.*, 294 Ill. App. 389 and *Fox* v. *Illinois Cent. R. Co.*, 308 Ill. App. 367. The law, as announced by these decisions, is not only the established law in Illinois but is generally followed by the courts of other states and by the federal courts. (*Reines* v. *Chicago, M. & St. P. & P. R. Co.*, 194 Wash. 146, 80 Pac. (2d) 406; *Probert* v. *Chicago, I. & L. Ry. Co.*, 93 F. (2d) 259.)

In *Reines* v. *Chicago, M. St. P. & P. R. Co.*, 194 Wash. 146, 80 Pac. (2d) 406, the Supreme Court of Washington reviewed cases from all over the United States involving the collision of a vehicle with the side of a train, and said at page 151:

"* * * that a person so unfortunate as to drive *or to be driven* into the side of a train standing or moving over a grade crossing could not, as a matter of law, recover from the railroad company."

And, continuing said:

"* * * We think, therefore, that the rule * * * is not only supported by the great weight of current authority, *but that the great weight of current authority is also to the effect that it is applicable when the*

crossing is more or less obscured by fog or other weather conditions." (Italics supplied.)

The *Langston* case recognized and approved this general rule, but because of the peculiar and unusual facts there involved, the Court held that the case fell within the exception to the rule. This appears from page 255 of the *Langston* decision, where the Court said:

"The appellant claims as a matter of law that the railroad company does not owe the traveling public a duty under the law to give warning of a train upon the crossing. *We think this may, as a general principle, be admitted to be true* but that it does not apply to the present situation. The defendant in this case undertook, by permitting the synchronizing of the signals at the Skokie highway crossing and at the railroad crossing to invite the public to cross its tracks when the lights were green to the west of the Skokie highway, and to warn the public that it should not cross the tracks when the lights to the west of the Skokie highway were red. The evidence discloses a case where there was an invitation to cross, with an implied assurance of safety. *This is quite different from the ordinary case where the train is, in itself, warning and no invitation is made by the railroad company.*

"It appearing in this case that there are facts and circumstances in evidence that the appellant undertook to furnish a certain method of warning the public when a train was approaching or on the crossing, *and the driver of the car being familiar with this method of warning,* it cannot be said, under the facts, that as a matter of law there was no negligence upon the part of the railroad company. * * *" (Italics supplied.)

It is clear, from an examination of the foregoing quotation, that the decision in the case at bar does not conflict with the law as announced in the *Langston* decision, and that the *Langston* decision, likewise, does not conflict with

the general rule of law. There is, therefore, no merit to petitioners' assertion that the writ should be granted for the reason that the Court of Appeals has decided "an important question of local law in a way probably in conflict with applicable local decisions."

Petitioners' real complaint is not that the decision of the Court of Appeals conflicts with the Illinois law; it is that the Court of Appeals did not decide that the facts in the case at bar fall within the exception announced in the *Langston* case and not within the general rule. This complaint, too, is without merit.

The facts in the two cases differ materially. In the *Langston* case there was an extra-hazardous crossing with synchronized highway and traffic signal lights, which the railroad had agreed with the highway authorities to maintain, and which were well-known to and relied on by the driver so that their failure to function properly constituted an implied invitation to cross in safety.

In the case at bar, the accident happened at an ordinary railroad crossing. There was nothing extra-hazardous about it, and there were no such special traffic signal lights. None of the occupants of the automobile had ever been over the road before; they were not familiar with the crossing, did not know where they were, and could not possibly have been relying on any known signals. (R. 33, 57, 68, 85.) There was not and could not, therefore, be any implied invitation to them to cross respondent's tracks. Because of these patent differences in the facts, the Court of Appeals correctly concluded:

> "We find nothing in the facts of this record to take the case out of the ordinary rule that 'one cannot recover for driving his automobile into a train standing across a crossing'." (R. 317, 185 F. (2d) 241, at 245.)

Conclusion.

We respectfully submit that the reasons urged by petitioners for granting a writ of certiorari are not valid. The Court of Appeals did not decide a federal question in a way in conflict with the applicable decisions of this Court; nor did it decide an important question of Illinois law in a way in conflict with the applicable Illinois decisions. The writ should, therefore, be denied.

Respectfully submitted,

ELMER W. FREYTAG,
KENNETH B. HAWKINS,
11 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Wabash Railroad Company, Respondent.